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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

Nos. 23 and 24

CHICAGO TITLE AND TRUST COMPANY, AS SUCCESSOR TRUSTEE UNDER TRUST DEED RECORDED AS DOCUMENT NO. 10325493,

Petitioner,

vs.

FORTY-ONE THIRTY-SIX WILCOX BUILDING CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

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FORTY-ONE THIRTY-SIX WILCOX BUILDING CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The petitioner's statement of the case (Brief, pp. 3-7) sets forth all the necessary facts with the following exceptions.

The petitioner's statement of the case does not disclose that within the time allowed by the Illinois Statutes no deed was issued to ripen into title the Master's Certificate of Sale issued August 5, 1931 to the purchasers in the lien foreclosure suit. Nor does the petitioner's statement of

the case disclose that the Master's Certificate of Sale was subsequently surrendered to the respondent.

The findings of the Master in respect to the mechanics' lien suit filed against the debtor corporation conclude with the following statement:

> "That no deed ever issued through, or under, said Master's Certificate, and that said Master's Certificate was purchased and now is the property of the Debtor." (R. 72.)

SUMMARY OF ARGUMENT.

I. The District Court, sitting as a bankruptcy court, had jurisdiction to entertain and determine the voluntary petition of the respondent for reorganization under Sections 77A and 77B of the Bankruptcy Act, as amended.

A. The power of the Federal Government "on the subject of bankruptcies" is constitutionally paramount to state authority to annul corporate existence.

1. Congress is given, by the constitution, power to establish uniform laws on the subject of bankruptcies throughout the United States.

2. The bankruptcy law of the United States is as much the law in each state as it is a law of the United States.

3. The statute of Illinois giving creditors the right to assert claims against dissolved corporations within two years of dissolution is a statute of limitations which cannot impair, limit or impede the national bankruptcy laws.

4. When a corporation is dissolved its property still exists for distribution and its creditors and stockholders still have an interest therein.

5. Bankruptcy courts are courts of equity and as such deal with substance and not with form.

6. As a proceeding in *rem* a bankruptcy court controls the assets of a bankrupt, whether or not the corporation can continue to pursue the powers given it in its charter.

7. As an analogy, bankruptcy courts have jurisdiction over partnerships even after dissolution but before the final settlement thereof.

8. Until Congress fixes some other limitation, a dissolved corporation, otherwise subject to the bankruptcy laws, will continue so subject until its assets have been adjudged and distributed among those entitled to the corporation's property.

B. The policy of Sections 77A and 77B of the bankruptcy act is for the protection of stockholders as well as creditors. To effectuate this policy requires an affirmance of the decision of the Circuit Court of Appeals.

1. Prior to the enactment of Sections 77A and 77B, proceedings under the old bankruptcy laws were inadequate to afford relief to corporate debtors and their stockholders.

2. Sections 77A and 77B clearly indicate that one of their purposes is the relief of stockholders of a corporation as well as relief of creditors.

3. Being remedial legislation, the Bankruptcy Act and its amendments are entitled to liberal construction.

C. Decisions of other federal courts without exception permit to dissolved corporations or their creditors the coverage of the bankruptcy laws.

1. A reversal of the decision of the Circuit Court of Appeals would cause hardship and confusion because of the unanimity with which the federal courts have ruled as did the Circuit Court of Appeals in the instant case.

2. Cases cited show that no court has expressed dissent from the rule announced by the Circuit Court of Appeals in the instant case.

3. Such of the authorities cited as presented the issue upon the filing of an involuntary petition by creditors cannot be differentiated from the instant case in which the petition was a voluntary one.

4. Bankruptcy courts have equal authority and exclusive power whether the matter is brought by the debtor or by creditors.

5. The decision of the Circuit Court of Appeals for the Sixth Circuit in *Vassar Foundry Co.* v. *Whiting Corp.*, 2 F. (2) 240 is not in conflict with the universal rule. The corporation in that case alleged itself to be *solvent* and hence the operation of the state law was not inconsistent with the Bankruptcy Act.

6. If the decision in the Vassar case is an exception to the general rule, it has been overruled by the later decisions of the Circuit Court of Appeals for the Sixth Circuit in *In Re Thomas*, 78 F. (2) 602, and in *Capital Endowment Co.* v. *Kroeger*, 86 F. (2) 976.

7. The case of *In re National Surety Co.*, 7 F. Supp. 959, presents no exception to the uniformly announced rule because it deals with an insurance company not subject to bankruptcy laws.

8. The dictum of Judge Evans in *In re 211 East Delaware Place Building Corporation*, 14 F. Supp. 96 to the effect that a different rule *may* obtain upon the filing of a voluntary petition is not the law of the Seventh Circuit.

II. The respondent corporation, even after the decree of dissolution, had a qualified existence under the Illinois Law.

A. Under the authorities of the state courts of Illinois, a public policy has been adopted giving dissolved corporations a continuing qualified existence to wind up their affairs and distribute their assets.

B. Under such policy corporations, even after dissolution and even after the running of the statute of limitations, may file writs of error, which under the Illinois practice, is the beginning of a new suit.

C. The Circuit Court of Appeals for the Seventh Circuit has determined that it is the public policy of Illinois that corporations upon their dissolution shall nevertheless be regarded as still existing for the purpose of settling up their affairs and having their property applied for the payment of their just debts; and that the rights of creditors and the corporation in such cases are *reciprocal*.

III. The petitioner had no standing to appear and contest the jurisdiction of the bankruptcy court.

A. The petitioner is a trustee under trust deeds given to secure mortgage bonds, and as such is not a creditor entitling it to challenge the jurisdiction of the Court.

B. The petitioner was entitled to come into these proceedings only in subordination to and in recognition of the original proceeding.

IV. The corporation had property which could be the subject of reorganization under Section 77B of the Bankruptcy Act.

A. The Master found that no deed had issued on the certificates of sale at the foreclosure of mechanics' liens on the property of the respondent corporation. Hence the respondent corporation has never been divested of its property.

B. Even if it has been divested of its property, it has an equity of redemption which is sufficient under Section 77B.

ARGUMENT.

I.

THE DISTRICT COURT, SITTING AS A BANKRUPTCY COURT HAD JURISDICTION TO ENTERTAIN AND DETERMINE THE VOLUNTARY PETITION OF THE RESPONDENT FOR REORGANIZATION UNDER SECTIONS 77A AND 77B OF THE BANKRUPTCY ACT, AS AMENDED.

A.

The Power of the Federal Government "on the subject of bankruptcies" Is Constitutionally Paramount to State Authority to Annul Corporate Existence.

In their fundamentals the issues presented in this case revert to and are determined by the decision in *Sturges* v. *Crowninshield,* February term, 1819, 4 Wheaton 122. It was there contended that the several states could legislate on the subject of bankruptcy until Congress exercised the power conferred upon it by the Eighth Section of the First Article of the Constitution, viz.

> "The Congress shall have power * * * to establish * * * uniform laws on the subject of bankruptcies throughout the United States".

On the other hand, it was contended that the grant of this power to Congress, without limitation, took it entirely from the several states.

The opinion of the Court, delivered by Chief Justice Marshall, declared,

> "Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to *establish** uniform laws on the subject throughout the United States * * * the power granted to Congress may be exercised or declined, as the wisdom of that body shall

* Italics, the Court's.

> decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that State legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States" (pp. 193, 195, 196).

This doctrine has been reaffirmed repeatedly, notably in *Stellwagen* v. *Clum,* 245 U. S. 605, 613; and in *In re Watts and Sachs,* 190 U. S. 1, 27. In the former it was said, page 613,

> "In view of this grant of authority to the Congress it has been settled from an early date that state laws, to the extent that they conflict with the laws of Congress enacted under its constitutional authority, on the subject of bankruptcies are suspended."

At the time of the decision in *Sturges* v. *Crowninshield* the conception of a bankruptcy law was one which discharged the debt of a trader in merchandise upon the petition of creditors (p. 194). The first national bankruptcy act (Act of April 4, 1800) was confined to persons "actually using the trade of merchandise" and provided only for involuntary bankruptcy. Subsequent national bankruptcy acts, for instance those of August 19, 1841 and of March 2, 1867, were held to be constitutional over the challenge that they extended to persons other than merchants and provided for voluntary proceedings. *Hanover National Bank* v. *Moyses,* 186 U. S. 181. By the Act of July 1, 1898 (30 Stat. at L. 544, Chap. 541, 11 U. S. C. A.) and the amendments of 1934 (48 Stat. at L. 912, 11 U. S. C. A. 207), Congress *established* further and more extended uniform laws on the subject throughout the United States.

Because of the decisions in *Sturges* v. *Crowninshield,* 4 Wheaton 122; *Ogden* v. *Saunders,* 12 Wheaton 213; *Stell-*

wagon v. *Clum*, 245 U. S. 605; and others, **the bankrupt law is as much the law in each state as it is a law of the United States.** *Conner* v. *Long*, 104 U. S. 228. In this case it was said, p. 240:

> "It (National Bankruptcy Act) is as truly the law of each State, as it is, and because it is, a law of the United States."

The authority of Congress being paramount over the subject of bankruptcy, no state legislature may attempt to determine, intentionally or otherwise, when the jurisdiction of the United States courts over insolvent or bankrupt corporations shall cease. Bankruptcy laws are concerned with the rights of creditors of distressed debtors, natural or artificial. Sections 77A and 77B are concerned likewise with stockholders of distressed corporations.

When the legislature of Illinois declared that the dissolution of Illinois corporations, when creditors were affected, should not impair the rights of those creditors within two years, it was enacting a statute of limitations within which the rights of such creditors should be asserted.

The statute, Smith-Hurd Rev. Stat. 1929, Act of 1919, reads:

> "SEC. 79. The dissolution, for any cause whatever, of any corporation, shall not take away or impair any remedy given against such corporations, its officers, or stockholders, for any liabilities incurred previous to its dissolution, if suit therefor is brought and service of process had within two years after such dissolution."

What the effect of that statute is upon the courts of Illinois is the subject matter of Section II of this brief. The present section contends that such a statute in no wise impairs, limits, or impedes the courts of the United States in their administration of the national bankruptcy laws.

Similar statutes are in effect in most, if not all, of the states. Their terms and times vary however. It would ap-

pear to be one of the absurdities and confusions which the bankruptcy act seeks to avoid that a Federal court may adjudicate in bankruptcy a corporation of Illinois within a two year period after dissolution, but a corporation of Minnesota*, for example, within a three year period.

Further the present Illinois statute, Business Corporations Act of 1933**, Illinois Revised Statutes, 1937, Chap. 32, Secs. 91 and 94, allows an Illinois corporation no stay of execution after dissolution for winding up its affairs and distributing its assets to those entitled thereto, as did Section 14 of Illinois Revised Statutes, 1929, Chap. 32, the statute under which the respondent suffered a decree of dissolution. As the petitioner's argument is understood, the U. S. District Court in Chicago would be ousted of jurisdiction to adjudicate a corporation a bankrupt upon its voluntary petition in bankruptcy if, during the pendency of such proceeding, a state court in Illinois were to decree under the statute of 1933 that such corporation was dissolved. The petitioner's argument leads inevitably to this absurdity.

When a decree of dissolution is entered by a court of the state creating a corporation, or when the charter of a corporation expires, the property of that corporation does not evaporate. Its real estate does not escheat to the state. Its bank account does not belong to the bank of deposit. Its assets belong to its creditors and its stockholders, as their interests may appear. This is true whether the corporation be solvent or bankrupt. The present bankruptcy laws are designed to aid both the creditors and the stockholders of a distressed corporation. As an artificial entity that corporation may be extinct, but its creditors, its stockholders, and its assets are not interred with the corpse. The assets remain for distribution.

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* Mason's Minnesota Statutes, 1927, Chap. 58, Sec. 7485.

** Cited in Appendix.

Bankruptcy courts are essentially courts of equity. Their proceedings, except where the act specifies otherwise, are inherently proceedings in equity. *Local Loan Co.* v. *Hunt,* 292 U. S. 234. A proceeding in bankruptcy is not a mere personal action, but is in the nature of a proceeding *in rem. Ibid.* Courts of equity deal with substance and not with form.

As a proceeding *in rem* the bankruptcy court controls the assets. As a proceeding in equity, it has jurisdiction of the debtor and the duty of adjudging claims. These obligations are in no manner impaired by the fact, if it be the fact, that the corporation can no longer pursue the powers given it in its charter.

Looking at substance and not at form, aiming at the practical and not the fictitious, the bankruptcy act provides, Sec. 5a, 11 U. S. C. A. 23a, that a partnership during its continuation of partnership business, or *after dissolution and before the final settlement thereof* may be adjudged a bankrupt as a distinct legal entity. *Liberty National Bank* v. *Bear,* 276 U. S. 215. *Meek* v. *Centre County Banking Co.,* 268 U. S. 426. *In re Double Star Brick Co.,* 210 F. 980, wherein the court said in holding that it had jurisdiction of a dissolved corporation, pp. 981, 982, that

> "the primary purpose of a bankruptcy proceeding is the distribution of the property of the debtor; the court takes hold of the *res* rather than the person."

And at page 982, the court said:

> "Perhaps still a better analogy to the present case is that of a partnership. It is familiar knowledge that under the Bankruptcy Act a partnership is deemed to be quite as much a legal entity as a corporation; the partnership estate is treated as distinct from that of the individual members of the partnership, and is so administered. But if the theory here urged is to be accepted, by parity of reasoning it must be held that a partnership may become insolvent and commit acts of

> bankruptcy, and thereupon the jurisdiction of the bankruptcy court may be defeated by the dissolution of the partnership, either through the voluntary agreement of the partners, or by reason of the death of one of them."

The case of a dissolved corporation before distribution of its assets is an exact analogy. Section 77B provides for the reorganization of the *res*. Its application should not be barred by the loss of corporate form. 35 Columbia Law Review 108 (1935).

The stockholders of a dissolved corporation are joint trustees of the corporate property until creditors' rights have expired or been discharged. A trust may reorganize under the provisions of Sec. 77B. In the instant matter, the *res* and the necessary parties are before the Court. A court of equity is not concerned with names if parties in interest are represented.

In the case of *In Re Mortgage Securities Corporation*, 75 F. (2) 261, 262, C. C. A. 2, the court said,

> "The debtor is itself made up of its shareholders, considered as a class, and just as they are bound together by their corporate form, so are the secured creditors by their common trust."

The power of Congress being supreme and paramount when exercised to establish uniform laws of bankruptcy, the limitation of Section 79 Illinois Revised Statutes 1929, Chap. 32,* requiring creditors to assert claims within two years of dissolution and the limitation of Section 14 Illinois Revised Statutes, 1929, Chap. 32,* requiring corporations whose powers have expired by limitation or otherwise to close business within two years, are subject to the exercise of the bankruptcy laws. Until Congress fixes some other limitation, a dissolved corporation, otherwise subject to the bankruptcy laws, will continue so subject (even though dissolved) until its assets have been adjudged and

* Appears in Appendix.

distributed among those entitled to the corporation's property. Any other rule permits each state to fix its limitation without regard to the power of Congress "to establish uniform laws on the subject of bankruptcies throughout the United States".

B.

The policy of Sections 77A and 77B of the bankruptcy act is for the protection of stockholders as well as creditors. To effectuate this policy requires an affirmance of the decision of the Circuit Court of Appeals.

Prior to the passage of the Act of June 7, 1934, Bankruptcy Act Sec. 77B, 11 U. S. C. A. 207, providing for corporate reorganization, proceedings under the old bankruptcy laws did not furnish adequate relief for distressed corporate debtors. Proceedings under the old bankruptcy laws were inadequate because no machinery existed to scale down secured debts without a sale of the security. Under such sales or under foreclosure sales there resulted, almost notoriously, a sacrifice of the property at an inadequate price. Usually a committee of bondholders bought in the property. The result was that dissenting bondholders and stockholders received nothing. Equity receiverships were inadequate for the same reason.

Only by the establishment of further uniform laws under the bankruptcy powers of Congress was adequate relief afforded. Equity receiverships went into discard. Building corporations petitioned the bankruptcy courts to enjoin foreclosure suits and for reorganization and rehabilitation.

The newly added sections 77A and 77B clearly indicate that one of their purposes is the relief of stockholders of the corporation as well as relief of creditors. For instance, under the express terms of 77B (k), 11 U. S. C. A. Sec. 207

(k), the provisions of Sec. 63 of the Act, 11 U. S. C. A. 103, dealing with the provability of claims is inapplicable in reorganization proceedings unless there is an order for liquidation.

When the history and purpose of the new bankruptcy legislation relating to reorganization are considered, the provisions ought to be given a liberal interpretation to accomplish the legislative intent. *In re Lake's Laundry,* 79 F. (2) 326 C. C. A. 2; *Continental Illinois National Bank and Trust Co.* v. *Chicago R. I. & P. Ry. Co.,* 294 U. S. 648.

Being remedial legislation, the Bankruptcy Act amendments are entitled to liberal construction under ancient rule.

The decision of the Circuit Court of Appeals effectuates the policy of Congress in that the stockholders of the corporate respondent are to have their day in court rather than to receive nothing at all without being heard.

C.

Decisions of other federal courts without exception permit to dissolved corporations or their creditors the coverage of the bankruptcy laws.

Because of the unanimity with which the principal issue in this case has been decided against the contentions of the petitioner, and because of the hardship and confusion which would result were this Court to change the rule; we feel justified in citing, in some number, but as briefly as possible, decisions supporting that of the Circuit Court of Appeals in the instant case.

1. *Capital Endowment Co.* v. *Kroeger,* 86 F. (2) 976, (C. C. A. 6, 1936, before Judges Hicks, Simons and Raymond. Opinion by Judge Simons.)

In June, 1935, the Ohio Supreme Court, upon an action in

quo warranto, ousted the debtor corporation from its corporate franchise. Following this proceeding, the corporation filed its voluntary petition for reorganization under Sec. 77B of the Bankruptcy Act. The petition was objected to on the ground that the corporation was not amenable to Sec. 77B for the reason that it had been ousted from its franchise. *Held*, the bankruptcy court had jurisdiction. At page 979, the court said:

> "The order of ouster entered against the debtor in the *quo warranto* proceedings by the Ohio Supreme Court cannot defeat the jurisdiction of the Bankruptcy Court over the assets of the corporation * * * *The fact that the debtor has been ousted from its corporate franchises in Ohio neither destroys its property nor its title* thereto. We cannot assume that any plan of reorganization approved in the Bankruptcy Court will fail to contemplate restoration of the debtor's corporate rights if that is possible, or failing, the organization of a new corporation to administer its assets for the benefit of creditors and shareholders. The organization of a successor corporation is not without the purview of reorganization plans under section 77B." (Italics supplied.)

The petitioner seeks to distinguish this case on the ground that the petitioning corporation had not been dissolved but had been ousted of its franchise. (Brief, p. 35.) This is not a real differentiation. It is merely the first grave digger's argument anent Ophelia's drowning as to whether the water comes to the man or the man goes to the water.

2. *Old Fort Improvement Co.* v. *Lea*, 89 F. (2) 286 (C. C. A. 4th, 1937). Before Parker, Northcott and Soper, Circuit Judges—Opinion by Judge Soper.

The question in this case was whether a South Carolina corporation was entitled in 1936 to file a voluntary petition in 77B when a receiver had been appointed for the corporation by a state court in 1927, the receivership still pending, and the charter of the corporation had been cancelled in

1934 for failure to pay certain license taxes. At the time of the petition, the corporation had land worth $20,000 and liabilities of $1,500, and it "could not meet its debts as they matured."

The State Court had entered an order that the property be sold and proceeds distributed, and it was the entry of this order which precipitated the filing of the 77B petition. The District Court dismissed the petition on the ground that the corporation was not such a corporate entity as was entitled to file under 77B. The Circuit Court of Appeals *reversed,* saying at p. 288 that:

> "The scope of section 77B is broader than was the act prior to the amendment, in that it covers not only corporations, which are insolvent, but also those which are merely unable to meet their maturing obligations; and the question arises whether the new section may be interpreted to apply to a dissolved corporation which is insolvent in either sense of the word. The question was decided in the affirmative, so far as an insolvent corporation is concerned, in the case of *In re 211 East Delaware Place Bldg. Corp.* (D. C.), 7 F. Supp. 892, affirmed on appeal (C. C. A.) 76 F. (2d) 834, where it was held that a petition to reorganize under section 77B might be filed by a corporation although a receiver for it had been appointed by the state court in a proceeding to foreclose a mortgage covering its entire property, and it had been subsequently dissolved by order of the state court for failure to pay its franchise tax. In the subsequent reorganization proceedings it was held, (D. C.) 14 F. Supp. 96, that notwithstanding the decision in *Duparquet, Huot & Moneuse Co.* v. *Evans, supra,* the bankruptcy court had jurisdiction under section 77B because the corporation was totally insolvent and all of its property had been put into the hands of a receiver in the state court. Proceedings for reorganization of dissolved corporations were also sustained in *Capital Endowment Co.* v. *Kroeger,* (C. C. A.) 86 F. (2d) 976, and *In re Forty-One Thirty-Six Wilcox Bldg. Corp.* (C. C. A.) 86 F. (2d) 667. See, also, Gerdes on Corporate Reorganization, vol. 1, § 54, pp. 167, 168; Remington on Bankruptcy (4th Ed.) 1936 Supp. § 100;

Tondel, Jr., Corporations Eligible for Relief under section 77B, 21 Minn. Law Review, 144, 159, January, 1937; Bird, Financial Associations under section 77B, 15 Texas Law Review, 65, 77, December, 1936. The only contrary holding, if it may be called such, is *In re National Surety Company* (D. C.) 7 F. Supp. 959, where it was held that an insurance company which had been dissolved so that its affairs were turned over for settlement to the Superintendent of Insurance of New York, who became vested with all of its property, was not subject for reorganization in the bankruptcy court upon the petition of its creditors. This case may be distinguished on the ground that the National Bankruptcy Act, 11 U. S. C. A. § 22, excludes insurance companies.

"We are in accord with these conclusions and are of opinion also that they are applicable to the reorganization under section 77B of dissolved corporations not totally insolvent but merely unable to meet their maturing obligations. . . .

. . . . . .

. . . (p. 290) it should be borne in mind that mere lapse of time after the appointment of an equity receiver by a state court will not oust the federal court of its jurisdiction to receive a petition for reorganization under section 77B."

The petitioner seeks to distinguish this case (Brief, p. 35) on the ground that the state statute continued the dissolved corporation until its affairs were closed. The legislature of South Carolina was aware of the national constitution and bankruptcy laws, and did not attempt by a statute of limitations to oust the federal courts from the administration of the property of distressed corporations.

3. *In re 211 East Delaware Place Bldg. Corp.*, 76 F. (2) 834, C. C. A. 7, 1935, before Evans, Sparks and Fitzhenry, Circuit Judges. Opinion by Judge Evans.

This case arose on the petition of three bondholders of the corporation who sought a reorganization under Sec. 77B of the Bankruptcy Act. The petition was filed after

foreclosure had been instituted and a state court receiver was appointed. The receiver was appointed on September 17, 1929, and on June 29, 1932, the state court entered a decree dissolving the corporation for failure to pay its franchise taxes. The petition under 77B was resisted on the ground that the corporation had been dissolved and the property passed to the stockholders, so that the debtor ceased to exist and was therefore not subject to the Bankruptcy Act. *Held*, the court had jurisdiction. At page 836, the court said:

> "• • • it by no means follows that the bondholders could not treat the corporation as an entity subject to adjudication under the Bankruptcy Act or under sections 77A and 77B of said act. That a corporation, thus dissolved, exists for certain purposes, Smith-Hurd Rev. St. Ill. 1931, c. 32, §§ 14, 79, Cahill's Rev. St. Ill. 1931, c. 32, pars. 14, 79, one of which is to have its estate administered in a court of bankruptcy is the holding of the courts that have passed on this question. *Hammond, et al.* v. *Lyon Realty Co.* (C. C. A.) 59 F. (2d) 592; *In re Double Star Brick Company* (D. C.) 210 F. 980; *In re Munger Vehicle Tire Company* (C. C. A.), 159 F. 901; *In re Storck Lumber Company* (D. C.), 114 F. 360."

4. *In re Surf Bldg Corp.*, 11 Fed. Supp. 295, D. C., E. D., Ill. 1934, Opinion by Judge Lindley.

This case arose on the petition of creditors of the corporation who filed an involuntary petition under Sec 77B. A foreclosure action against the corporation had been pending in the state court for over three years. The corporation had forfeited its charter for non payment of franchise taxes; it had executed a conveyance to nominees of the bondholders' committee; and the decree in the foreclosure had been entered by the time this case arose, but there had not yet been a sale. The court held that the loss of the corporation's charter was no bar to the petition under 77B, saying at page 297:

"Nor is the fact that the corporation has lost its

charter any bar to the jurisdiction of this court. In the recent case of *In re 211 East Delaware Place Building Corporation, a corporation*, 7 F. Supp. 892, this court pointed out that to hold that the loss of franchise for non payment of taxes deprives the federal court of jurisdiction would be to deprive the United States court of its constitutional jurisdiction to liquidate, administer, marshall, and distribute in bankruptcy, assets of any debtor."

5. *Hammond* v. *Lyon Realty Co.*, 59 F. (2) 592, C. C. A. 4, 1932. Before Parker and Soper, Circuit Judges, and Way, District Judge. Opinion by Judge Soper.

The sole question in this case was whether the dissolution of an insolvent corporation by a state court deprives the federal court of jurisdiction in bankruptcy proceedings subsequently instituted. On November 4, 1931, a creditors' petition in bankruptcy was filed alleging among other things, that state court receivers had been appointed in a foreclosure action. The receivers objected to the bankruptcy petition on the ground that the state court had on October 1, 1931, dissolved the corporation and that it therefore was not an existing corporation. The Maryland statutes do not have a provision extending the life of a corporation, after dissolution, for *any* purpose. The statutes do provide that in the dissolution decree a receiver shall be appointed to take the property of the corporation. The court held that the bankruptcy court had jurisdiction, saying at page 593 that:

"* * * it would certainly be contrary to the spirit of the National Bankruptcy Act to hold that insolvent corporations are excluded, by dissolution, from the scope of its provisions, and that the distribution of their assets and the final settlement of their affairs must be left to the state courts. * * *

(p. 594) "It has been uniformly held, in accordance with these principles, that the dissolution of an insolvent corporation does not put it outside the jurisdiction of the federal court in bankruptcy. It was decided

by Judge Morris of the District Court of Maryland, in *Re Storck Lumber Co.*, 114 F. 360, that the Maryland statute then in force providing for the dissolution of an insolvent corporation, the setting aside of unlawful preferences, and the distribution of its assets among the creditors, was in the nature of an insolvent law, and, as such, was superseded by *the application of the broad principle that bankruptcy law is to govern the administration of the estates of all insolvent debtors.* Similar views have been expressed as to the effect of similar state statutes by courts and text-writers both before and after the decision of *In re Storck Company, supra,* and there has been no dissent.

"The appellants would distinguish this array of authority by pointing out that in most, if not all, of the cases, the corporation had not been completely or validly dissolved when the adjudication took place, or at least that the dissolution was decreed after the proceedings in bankruptcy in the federal court had been instituted. It is said that no court has ever held that a corporation, finally dissolved under a state statute which contains no provision for the continuance of the life of the corporation during the settlement of its affairs, is within the purview of section 4b of the National Bankruptcy Act. It is not clear that so sweeping a statement is correct; and, in any event, it is evident that the decisions were not based merely on the ground that the corporate life had not completely ceased, but on the broader ground that *neither the legislature nor the courts of a state can take action which restricts the scope of the national bankruptcy system.* It has rather been the view of the courts that *the National Bankruptcy Act so far controls the dissolution of an insolvent corporation as to prevent its legal extinction by superseding, at least temporarily and to the extent necessary, all state laws which would prevent the creditors from having the assets of insolvent debtors administered in accordance with the terms of the federal act. It has been thought that to hold otherwise would be to allow the states, by a particular form of legislation, or by the action of their courts, to override a law of Congress on a subject over which the Constitution has given to Congress supreme power.*" (Italics added.)

6. *In re Booth's Drug Store, Inc.*, 19 F. Supp. 95, D. C. Va., 1937.

In this case the corporation was incorporated in 1925. In 1935 the State Corporation Commission issued a certificate revoking the charter for failure to pay the annual registration fees and franchise taxes. The corporation continued in business under its corporate name for considerably over a year and then had a judgment against it in its corporate name; it then made an assignment for the benefit of creditors, which was an act of bankruptcy. On January 19, 1937, certain creditors filed an involuntary petition in bankruptcy.

The objection to the petition was that the corporation was dead, and because a dead man could not be held to be a bankrupt a dead corporation could not, and those cases where a dissolved corporation could come into the bankruptcy court were cases where the act of bankruptcy occurred prior to the dissolution. *Held* the adjudication of bankruptcy should be made. The Court said (p. 96):

> "The doctrine of the common law was that upon expiration of its charter, a corporation at once lost its identity and its powers; its life was instantly terminated. All debts due to or from it were extinguished, at least so far as any right of action thereon was concerned. Upon the dissolution of a corporation all of its rights and liabilities became extinct. • • • A corporation could not, after dissolution, either sue or be sued. • • •
>
> "In the course of time, however, most of the states—probably all of them—have enacted statutes relating to the duties, powers, responsibilities and liabilities of corporations as affected by their dissolution or the forfeiture of their corporate existence. • • •
>
> "Under the influence of the modern rule, there is abundant authority to the effect that the mere fact that a corporation has been dissolved, or has had its charter revoked under a state law, does not oust the jurisdiction of a court of bankruptcy previously obtained nor deprive a court of bankruptcy from taking jurisdiction after the dissolution.
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> • • • • •

(p. 97) "The statute specifically grants to a dissolved corporation the power to convey and dispose of its property. For that purpose and to that extent it is still a living entity. The powers of the corporation are limited after its dissolution but if, acting within the limits of those powers, it commits an act of bankruptcy, there would seem no reason why it should be immune from the legal consequences of such act. If this corporation, prior to the order revoking its charter, had made an assignment for the benefit of its creditors, there could be no question of the right to have it adjudicated a bankrupt upon such act. After the revocation of the charter it still had the right to convey property, and if in the exercise of this unquestioned power it committed an act of bankruptcy it is, in my opinion, equally subject to adjudication."

7. *White Mountain Paper Co.* v. *Morse & Co.*, 127 Fed. 643, C. C. A. 1, 1904, before Colt and Putnam, Circuit Judges, and Brown, District Judge. Opinion by Putnam, J.

After an involuntary petition in bankruptcy had been filed, but before the adjudication, the state court entered a decree dissolving the corporation. Because the corporation "was non-existent," an objection was made that it could not be adjudged a bankrupt. The statute provides that upon dissolution the corporation shall be continued for the purpose of prosecuting and defending suits and to enable it to settle and close its affairs "but not for the purpose of continuing the business for which they were established."

Held, the bankruptcy court had jurisdiction; the decision being based on the proposition that the dissolution decree did not in fact effect a *true dissolution* because under the statute it retained for a specified period a *qualified existence.*

8. *Cresson & Clearfield Coal Co.* v. *Stauffer*, 148 Fed. 981, C. C. A. 3, 1906. Before Dallas, Gray and Buffington, Circuit Judges. Opinion by Judge Gray.

In July, 1905, the sheriff seized all property of the cor-

poration on a judgment obtained against it, and sold the property which included the "franchise right to be a corporation." In December, 1905, an involuntary petition in bankruptcy was filed against the corporation *which was consented to by the corporation, in writing.* Adjudication was in February, 1906. The petition was objected to on the ground that the sale under the *scire facias* worked, under the Pennsylvania laws, a dissolution of the corporation and that the bankrupt therefore had no existence; and that for the same reason, the corporation could not consent through its directors to the bankruptcy adjudication. *Held,* the court had jurisdiction. At page 984, the court said:

> "It is true, that the law already referred to provides that the property and franchises of the corporation, sold under this special *fi. fa.,* shall pass to the purchaser, thus, in effect, terminating the existence of the old corporation. If, however, the proceeding by which this property and franchises were sold, was an act of bankruptcy, it was void and of no effect. *If it were not, still the existence of the corporation is not terminated in every respect by this requirement* of the state law. It has often been held that, *even where a charter expires by time,* its existence will be considered as being *extended for the purpose of winding up its affairs,* securing creditors and satisfying the ends of justice, *even without special statutory authority* for that purpose, and we think that *the paramount authority of the federal bankrupt law is sufficient to keep alive the corporation* in this case for the purposes of the bankrupt jurisdiction created by the said act, and to give efficacy to the admission made by the directors of the insolvent corporation as an act of bankruptcy." (Italics supplied.)

9. *In re Thomas,* 78 F. (2) 602, C. C. A. 6, 1935. Cert. den. in 56 Sup. Ct. 149. Before Moorman, Hicks and Allen, Circuit Judges. Opinion by Judge Allen.

On appeal from an order denying motion to dismiss a petition for adjudication of bankruptcy. The facts show that

on March 29, 1933, the debtor, a Michigan corporation, while insolvent, filed a petition in the state court seeking dissolution of its charter; and on May 10, 1933, a decree was so entered, and a receiver was appointed. The petition in bankruptcy was filed July 28, 1933, less than four months after the decree of dissolution, and it was an involuntary proceeding. The objection to the petition was that the decree of dissolution extinguished the corporation and because it no longer existed, it could not be amenable to the Bankruptcy Act. The Supreme Court of Michigan in *Cady* v. *Centreville Knit Goods Mfg. Co.*, 48 Mich. 133, 11 N. W. 839, and in *Jacobs* v. *E. Bement's Sons*, 161 Mich. 415, 126 N. W. 1043, had stated that after such a dissolution decree, the corporation no longer exists. The court held that the corporation could be declared a bankrupt. At page 603, the Court said:

> "If the duties of the corporation have not been fully discharged, the paramount jurisdiction of the Bankruptcy Court under article 1, section 8, cl. 4 of the Constitution of the United States attaches, and may not be defeated by dissolution under state law. As stated by Mr. Chief Justice Fuller in *In re Watts & Sachs*, 190 U. S. 1, 27, 23 S. Ct. 718, 724, 47 L. Ed. 933, 'The operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes.'"

10. *In re Munger Vehicle Tire Co.*, 159 F. 901, C. C. A. 2, 1908. Before Lacombe, Coxe, and Noyes, Circuit Judges. Opinion ~~*per*~~ *curiam.*

In 1905 the Governor of New Jersey proclaimed that the charter of the corporation was void for failure to pay taxes. In 1906 the board of directors held a meeting and resolved to take action in a suit filed against the corporation on a claim of a director. In 1907 the corporation was adjudged a bankrupt. The objection to the bankruptcy petition was based on the ground that "the company was defunct, and,

like a deceased person, incapable of being adjudged a bankrupt.". The New Jersey statutes provided that for two years after dissolution the corporation should be continued for the purpose of prosecuting and defending suits, and to settle and close its affairs. *Held,* the corporation could be adjudged a bankrupt. The court said at page 905 that "a proceeding in involuntary bankruptcy may fairly be considered a suit to settle and close up the affairs of the bankrupt and dispose of its property."

11. *In re American & British Mfg. Corp.*, 300 F. 839, D. C. Conn. 1924.

In 1921, a creditors' bill was filed in New York against a New York corporation, receivers were appointed to take over the assets in Connecticut and in New York, and all of the assets were liquidated by the receivers. In November, 1923, more than six months after the assets were liquidated, the corporation filed a *voluntary* petition in bankruptcy in the Connecticut district. The petition was objected to on the ground that the district court in Connecticut had no jurisdiction in view of the action had in New York. *Held,* the court had jurisdiction.

At page 847, the court said:

> "To hold as the petitioner claims would be to rule that, once a receiver is appointed, the business then loses its character, and not only is operated under court direction, but that a debtor could not receive the benefits of the Bankruptcy Act, at least while the receivers were in charge. I do not find that the authorities so hold, and the contrary seems the most reasonable and equitable rule."

In addition to the foregoing decisions, the Court is referred in the footnote to Law Review articles approving the decisions.

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35 Columbia Law Review 108 (1935).

21 Minnesota Law Review 144 (1937).

Such of the foregoing decisions as presented the issue upon the filing of an *involuntary* petition by creditors, are distinguished by the petitioner upon that ground. *The distinction has no validity. Bankruptcy courts, if they have jurisdiction at all, have equal authority and exclusive power, whether the matter is brought by the debtor or by creditors.*

Whether the bankruptcy court has jurisdiction is measured, not by the nature of the petition, but by whether the debtor corporation has committed an act of bankruptcy or is unable to meet its debts as they mature and has not wound up its affairs by distributing its assets to those entitled thereto. It is of such corporations that the national bankruptcy act takes cognizance.

The statute of limitations is found in this test of condition and circumstance, and not in some arbitrary rule of a state legislature.

Until the duties of a distressed corporate debtor have been fully discharged, the jurisdiction of the bankruptcy court is paramount. *Voluntary as well as involuntary petitions call for the exercise of that jurisdiction.*

An apparent exception to the rule announced in the foregoing cases is found in the decision of *Vassar Foundry Co. v. Whiting Corp.*, 293 F. 248, affirmed 2 F. (2) 240, CCA 6, referred to on pages 29 and 30 of petitioner's brief. The decision was rendered before the amendments to the bankruptcy act. The corporation had been dissolved by a state court order and a receiver put into possession of its assets. A year later the corporation filed its *voluntary* petition in bankruptcy. The court, composed of circuit judges Denison, Mack, and Donahue, speaking through the former said (p, 241):

> "So far as the statute (Michigan) applies to *solvent* corporations, it clearly is not subject to be defined as an insolvency law, nor is its existence or operation in-

> consistent with the purpose of the Bankruptcy Act. * * * In these proceedings, the petition alleged that the corporation was *solvent; that clearly gave the state court jurisdiction*, whether the allegation was true or not. * * * This conclusion does not leave an open door for *insolvent* Michigan corporations to escape bankruptcy." (Italics supplied.)

From the above it is apparent that the court recognized the supremacy of the federal bankruptcy law, *for it is said that the operation of the state law was not inconsistent with the bankruptcy act since the corporation alleged itself to be solvent.*

Furthermore if the decision in the Vassar Foundry Co. case is an exception to the otherwise uniformity of decision, it has been overruled by the later decision of the Circuit Court of Appeals for the Sixth Circuit in In re Thomas, 78 F. (2) 602, and in Capital Endowment Co. v. Kroeger, 86 F. (2) 976. In the latter case in allowing a voluntary petition to be filed, the court said, p. 979:

> **"The fact that the debtor has been ousted from its corporate franchises in Ohio neither destroys its property nor its title thereto."**

The case of *In re National Surety Company*, 7 F. Supp. 959, presents no exception to the rule announced uniformly. The corporation was classified as an insurance company; and its property had been turned over to the Superintendent of Insurance of New York. The national bankruptcy act excludes insurance companies, 11 U. S. C. A. Sec. 22.

The dictum of Judge Evans, while sitting in District Court in *In re 211 East Delaware Bldg. Corp.* 14 F. Supp. 96, is referred to in petitioner's brief page 31. There are three answers: first, it is dictum; second, Judge Evans speaks of the "effect which this loss of corporate existence *may* have" upon the filing of a voluntary petition; and third, the dictum does not announce the rule in the Seventh Circuit as stated subsequently in the instant case.

To summarize Section I of this brief:

The powers of the federal legislature and courts are supreme and exclusive (when exercised) over bankruptcy matters.

No state can annul corporate existence to defeat or impair the paramount federal authority.

The federal bankruptcy courts have jurisdiction until the affairs of a corporate debtor, which is bankrupt or cannot meet its obligations as they mature, have been closed and its property distributed or reorganized.

The policy of the recent amendments to the bankruptcy act is to protect stockholders as well as creditors. To that end the amendments and Act, as remedial legislation, should be liberally interpreted.

Without exception, decided cases concur with the holding of the Circuit Court of Appeals in the instant case. To reverse this uniform rule would establish interminable confusion.

II.

THE RESPONDENT CORPORATION EVEN AFTER THE DECREE OF DISSOLUTION HAD A QUALIFIED EXISTENCE UNDER THE ILLINOIS LAW.

The foregoing section of this brief is concerned with the relationship between the paramount authority of the Federal legislature and the Federal courts over bankruptcy matters as compared with the authority of the state to dissolve a corporation. It is contended in that section that even though the respondent corporation is dissolved by the decree of a court of competent jurisdiction, nevertheless a federal court of bankruptcy has power to wind up the affairs of that corporation for the benefit of its stockholders and its creditors.

It is the thesis of this section of the brief that the respondent corporation even after dissolution has a qualified and continuing existence under the laws of Illinois until its affairs are wound up, its creditors satisfied, and its remaining assets distributed to its stockholders.

The respondent corporation was dissolved pursuant to the provisions of the general corporation act of Illinois, which became effective July 1, 1919. Section 14 of that Act (Smith-Hurd Illinois Rev. Statutes, 1929 Chap. 32)*. It is provided that all corporations of the state whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts and selling and conveying the corporate property. It is further provided that such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity. Section 79 of the same Illinois Act provides that dissolution for any cause whatever shall not impair any remedy against such corporations for liabilities incurred previous to dissolution if suit is brought within two years after such dissolution.

Previous to the enactment of the General Corporation Act of Illinois of 1919, the provisions of Section 14 thereof had appeared in Sections 10 and 11 of Chap. 32, Illinois Revised Statutes, relating to Corporations. Under these earlier but similar provisions there arose the case of *Singer & Talcott Co.* v. *Hutchinson,* 176 Ill. 48 (1898). In that case the Court held that the Corporation, though it had been dissolved by expiration of its charter, and more than two years had expired, still continued to exist so that it could bring a writ of error to the Supreme Court of Illinois for the purpose of reversing a judgment which had been rendered against it. The Court said (p. 51):

> "The law is, that the corporate capacity of a corporation to sue ceases on dissolution, except as such capacity is continued by statute, or its name is used in an equitable proceeding for the purpose of distributing its assets as a trust fund."

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* The appropriate sections of the General Corporation Act of Illinois in force at the time of the decree of dissolution of the respondent corporation are set forth verbatim in the Appendix.

Further, the court said (p. 53):

> "This corporation was kept alive for the purpose of being made such a party to the original action, and, being so alive for such purpose, is preserved by the Practice-act with authority to prosecute an appeal or a writ of error."

It is to be noted that in this case, the Supreme Court of Illinois stated (p. 51) that it was the established law of the State, evidenced by a long line of decisions, that the suing out of a writ of error was the beginning of a new suit.

In the earlier case of *Life Assn. of America*, v. *Fassett*, 102 Ill. 315, the Supreme Court of the State held (p. 323-4):

> "With a view of mitigating the rigor of the common law with respect to the effects of a defunct corporation, the legislature of this and most, if not all, of the other states of the Union have, by appropriate legislative enactments provided for a just and equitable distribution of their assets in cases of insolvency, or sudden dissolution from any cause, and our own act on the subject contains a provision which in express terms extends their corporate existence two years from the date of their dissolution, for such purpose. Sections 10 and 25, chap. 32, Rev. Stat.
>
> From these and other provisions of the statute it clearly appears that it is a part of the settled policy of the State, at least so far as domestic corporations are concerned, that upon their dissolution, however that may be effected, they shall nevertheless be regarded as still existing for the purpose of settling up their affairs and having their property applied for the payment of their just debts. * * *"

Many subsequent decisions of the Illinois courts have announced the same doctrine. For instance, in *Commercial Trust Co.* v. *Mallers*, 242 Ill. 50, 53, the Court said:

> "It was held in *Life Association of America* v. *Fassett, supra*, that it is a part of the settled public policy of this State that upon the dissolution of a corporation, no matter how the dissolution may be effected, the corporation shall nevertheless be regarded as still existing for the purpose of settling up its affairs. In this

> case the suit was commenced while the defendant in error was a going corporation, and we see no reason why it should not be permitted to prosecute its suit to final judgment for the purpose of collecting its assets and settling up its affairs, even though it went into voluntary liquidation pending the litigation. In *Singer & Talcott Stone Co.* v. *Hutchinson*, 176 Ill. 48, it was held that a writ of error—a new suit—might be sued out by a corporation to review a judgment rendered against it, notwithstanding two years had elapsed after its dissolution."

See also *Perry* v. *Western Motor Car Co.*, 279 Ill. App. 195, 202; *Griggsville State Bank* v. *Newman*, 275 Ill. App. 11, 15.

These and other decisions of the state courts of Illinois have been found by the Circuit Court of Appeals for the Seventh Circuit to announce the rule here argued. In *American Bank & Trust Co.* v. *Hon*, 48 F. (2) 588, the appellant contended that the corporation had been completely dissolved and that the judgment against it having been recovered after the bank had been dissolved by order of the Circuit Court of Cook County, was void. After reviewing the Illinois law, the Circuit Court of Appeals, speaking through Judge Sparks for himself and Judges Alschuler and Evans said (p. 591):

> *"It seems quite clear under the Illinois decisions that a public policy has been adopted for this state in relation to the controversy before us which is at variance with appellant's contention and that the rights of the claimant and the corporation in such cases are reciprocal."*

The petitioner claims that its rights and the respondent's rights in the instant suit are not reciprocal. The petitioner agrees that creditors could file an involuntary petition against the respondent, but denies the right of the respondent to file a voluntary petition. No sound reason is given for such a distinction. Manifestly it would be unjust

and inequitable under the present policy of the bankruptcy laws for the bankruptcy courts to be open for creditors but not for stockholders. Since the effective date of Sections 77A and 77B, stockholders, speaking through the corporate form, are given the protection of bankruptcy proceedings.

In its brief, the petitioner denying even a qualified existence of the respondent corporation, cites (pp. 15 and 16) the cases of *Dukes* v. *Harrison & Reidy*, 270 Ill. App. 372, and *Consolidated Coal Co.* v. *Flynn Coal Co.*, 274 Ill. App. 405. In each of these cases creditors filed bills in equity more than two years after dissolution of the corporation. Such bills were dismissed because of the specific limitation in Section 79 of the then General Corporation Act of Illinois that suit must be brought and service of process had within two years after dissolution.

In *City Insurance Co.* v. *Commercial Bank*, 68 Ill. 348, cited by the petitioner on page 14 of its brief, the Court of Illinois was announcing the common law rule recognized by the Court in the later decision of *Life Assn. of America* v. *Fassett*, 102 Ill. 314, cited above. In the latter case, the Court says, as quoted above, that the rigors of the common law with respect to the effects of a defunct corporation have been mitigated by the legislature of Illinois, and by most of the other states of the union.

It is not contended that the respondent corporation has an unqualified existence under the laws of Illinois; but it is contended that under the statutes and decisions of Illinois a public policy has been adopted which permits corporations to continue their existence after dissolution for the purpose of winding up their affairs, satisfying creditors and distributing assets; and that the rights of the corporation and its creditors in this regard are reciprocal.

III.

THE PETITIONER HAD NO STANDING TO APPEAR AND CONTEST THE JURISDICTION OF THE BANKRUPTCY COURT.

Section 77B, Sub-division (a), of the Bankruptcy Act, as amended, provides for the filing of a petition for reorganization. The same sub-division provides:

> "If three or more creditors, who have provable claims, which amount in the aggregate in excess of the value of the securities held by them, if any, to $1000.00 or over, or if stockholders, holding 5 per centum in number of all shares of stock of any class of the Debtor outstanding, shall, prior to the hearing provided for in subdivision (c) clause (1), of this section, appear and controvert the facts alleged in the petition or answer, the Judge shall determine as soon as may be the issues presented by the pleadings . . . ."

In its answer to the bankruptcy petition of the respondent corporation that the Court take jurisdiction over its property, the Chicago Title & Trust Company alleged (R. 10) that it was successor trustee under trust deeds. The Masters Report (R. 71) finds that the trust deeds were to secure indebtedness of $95,000 and $15,000 respectively.

Under such circumstances, the petitioner, Chicago Title & Trust Company, was not qualified to contest the jurisdiction of the Court. In the case of *1030 North Dearborn Building Corporation*, 7 F. Supp. 896, (D. C. E. D. Illinois), the Court, Judge Lindley, held (p. 897)

> "The Trustee under the trust deed does not constitute three creditors who are qualified under subdivision (a) to appear and controvert the allegations of the petition."

Further, the Court held, after quoting Equity Rule 37, to the effect that intervention shall be in subordination to and in recognition of the propriety of the main proceeding that (p. 898):

> "Accordingly, giving consideration to the provisions

of the Bankruptcy Act aforesaid and applying the rules governing equity procedure, which, in the absence of statutory directions, control in bankruptcy, I am of the opinion that the applicants for intervention may not properly be admitted for the purpose of contesting the jurisdiction of the court or for the purpose of defeating the petition, but that they may be admitted upon proper petitions for intervention in subordination to and in recognition of the original proceeding for the purpose of presenting by bill of intervention or other appropriate pleadings their respective rights and interests in any property involved in this litigation."

A trustee cannot as such vote upon a plan of reorganization. *In re Allied Owners' Corporation,* 74 F. (2) 201, C. C. A. 6.

If we are mistaken in our views that the Chicago Title & Trust Company is not a creditor, it certainly is not *three* creditors. Opposition to the filing of a petition for reorganization cannot be made by one creditor. *In re Cheney Bros.* (D. C. Conn.), 12 F. Supp. 609, Thomas, Judge.

IV.

THE CORPORATION HAD PROPERTY WHICH COULD BE THE SUBJECT OF REORGANIZATION UNDER SECTION 77B OF THE BANKRUPTCY ACT.

On July 10, 1931, a decree was entered against the respondent corporation foreclosing certain mechanics' liens on its property; and on August 5, 1931, a Master's Certificate of Sale was issued to the purchasers (R. 72). Respondent's right to redeem the property expired on August 5, 1932 and the right of its creditors to redeem expired on November 5, 1932. (Smith-Hurd Ill. Rev. Statutes, 1929, Chap. 77, Sections 18 and 20, set out in the Appendix hereto.)

The corporation was not, however, divested of its prop-

erty by the sale and Master's Certificates under the mechanics' lien foreclosure. The certificates of sale could only ripen into title if a deed were given to the purchaser within five years from the expiration of the time of the redemption.

The pertinent Illinois statutes (Ill. Rev. Stats. Ch. 77, Sec. 16 and 30, laws of 1921) provide as follows:

> "Sec. 16. When any real estate is sold by virtue of an execution, judgment, or decree of foreclosure of mortgage, or enforcement of mechanics' lien, or vendor's lien, or for the payment of money, it shall be the duty of the sheriff, master in chancery or other officer, instead of executing a deed for the premises sold, to give to the purchaser a certificate describing the premises purchased by him, showing the amount paid therefor, or if purchased by the person in whose favor the execution or decree is, the amount of his bid, the time when the purchaser will be entitled to a deed, unless the premises shall be redeemed, as provided in this Act."
>
> Sec. 30. When the premises mentioned in any such certificate shall not be redeemed in pursuance of law, the legal holder of such certificate shall be entitled to a deed therefor at any time within five years from the expiration of the time of redemption. The deed shall be executed by the sheriff, master in chancery or other officer who made such sale, or by his successor in office, or by some person specially appointed by the court for the purpose. If the time of redemption shall have elapsed before the taking effect of this Act, a deed may be given within two years from the time this Act shall take effect. When such deed is not taken within the time limited by this Act, the certificate of purchase shall be null and void; but if such deed is wrongfully withheld by the officer whose duty it is to execute the same, or if the execution of such deed is restrained by injunction or order of a court or judge, the time during which the deed is so withheld or the execution thereof restrained shall not be taken as any part of the five years within which said holder shall take a deed."

In *Seeberger* v. *Weinberg,* 151 Ill. 369, 37 N. E. 1033, the Illinois Court was dealing with Section 30 of the statute set out above, and the Court held that if no deed is obtained within the five year period, the certificate of sale is null and void, and the purchaser who neglects to take out a deed within the five year period cannot thereafter assert any title to the land, either at law or in equity, through his purchase.

In *Ryhiner* v. *Frank,* 105 Ill. 326, the Illinois Court held that where the sheriff's deed was not taken within the time limited by this section (Sec. 30) the certificate of purchase on which the deed was given became null and void, and the deed was of no effect.

At the time the Master made his report he found that no deed on the Master's Certificate of the state court had ever issued (R. 72). Moreover the deed will never issue because the respondent corporation has acquired the certificate or certificates of sale. The interests in the certificate of sale were surrendered by mesne conveyance to the debtor corporation resulting in a merger of the lien interest and the fee. (See Debtor's Exhibits 3, 5 and 7, R. 46, 48 and 50.) The Master specifically found that the certificates of sale are now the property of the debtor (R. 72, Finding 10).

Since, in the instant case, the deed was never obtained, the corporation has, and always has had, the property. It was never divested of the property. It is not, as the petitioner states in his brief (p. 5), a mere "possibility that the certificate of the sale of the Wilcox Avenue property might become void if the holder failed to take out a deed within five years of the expiration of the period of redemption." But even if it were true, which we do not admit, that the corporation had been divested of its property, and that the only "property" it had was the possibility that the certificate of sale would become void for failure of the holder

thereof to take out a deed, this would still be property sufficient under Section 77B. *In Re Argyle-Lake Shore Bldg. Corp.*, 78 F. (2) 491, C. C. A. 7, the corporate property had been purchased at a sale for taxes, so that the only property the corporation had was the right of redemption before the execution of the deed, and the Court held that this right of redemption was an asset and, therefore, within the jurisdiction of the Federal Court in which a petition for reorganization had been filed.

So also in *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & Pac. Ry. Co.*, 294 U. S. 648, (1934) it was held that a mortgagee who was in possession of the property of the debtor corporation, could be ousted of the possession by the bankruptcy court in a proceeding under Section 77 of the Bankruptcy Act, which is practically identical with Section 77B of the Act.

In Re Central Funding Corporation, 75 F. (2) 256; C. C. A. 2, (1935) where a funding corporation organized by a mortgage guaranty company in connection with a plan for the refunding of securities, guaranteed by the latter, issued bonds under a trust indenture secured by bonds and mortgages assigned to the trustee thereunder, and the funding company afterwards became insolvent, the collateral in the hands of the trustee being much less than the amount of the bonds outstanding, so that the funding company had no equity remaining in the collateral, and a petition for reorganization was filed under Section 77B, it was *held* that the petition was properly filed, and that the objection that the corporation had no equity to reorganize was not well taken. The Court speaking through Judge Augustus Hand there said (p. 259) that

> "a 'reorganization' does not necessarily presuppose the survival of the rights of stockholders or even of junior creditors, when they have become worthless,

but may be a readjustment of the rights of lienors under a new corporate structure"

and (at p. 260)

"The language of Section 77B (b) indicates that the *reorganization may be had though no equity remains in the corporation.*" (Italics supplied.)

It was also said at page 261:

"*It makes no difference whether the debtor has an equity of any value or not,* or whether his business is to continue for five or ten years or indefinitely. The most frequent occasion for a reorganization is where only creditors' rights are to be adjusted and liquidation is to be slow enough to take advantage of market conditions obtaining over a long period. Section 77B expressly provides for such situations as we have here, and they are proper subjects of bankruptcy legislation. *To restrict the act to reorganizations where the debtor has an equity, would be to deprive the section of much, if not most, of its usefulness.*" (Italics supplied.)

In Re Mortgage Securities Corporation, 75 F. (2) 261, C. C. A. 2, (1935) the court of the Second Circuit held that where the debtor has conveyed away all of its interest in the security, stripping itself of all its property except a questionable residue in a few bank accounts, it may still avail of reorganization under Section 77B. It was said that the lack of any equity remaining *in the corporation or the stockholders* does not prevent the operation of Section 77B, and it is immaterial how their interests were divested, whether by a conveyance or by a collapse in property values. At page 262 the court said:

"By these conveyances it had stripped itself of all its property except for a somewhat dubious residue in some bank accounts, amounting at most to a few thousand dollars. We have held that a substantial equity is not necessary to justify the proceeding. *We see no reason to stick at a phantom equity whose value is a mere visionary possibility.* The debtor is itself made up of its shareholders, considered as a class, and, just as they are bound together by the corporate form,

so are the secured creditors by their common trust. Indeed, the shareholders, the unsecured creditors, and the secured, are each a separate order in one hierarchy; each has its proper unity; the section is intended as a remedy to allow all or some of these classes to establish a concourse which will avoid that dismemberment of their interests which other remedies occasion. Thus it can make no difference that the group of shareholders has been definitely eliminated, either by a legal transaction as here, or by such a collapse in value that there is no reasonable expectation of revival." (Italics added.)

In Re Hotel Gibson Co., 11 Fed. Supp. 30, the corporation merely held the lease to certain property which it operated as a hotel, yet there the court held that it had sufficient property to be subject to Section 77B for reorganization purposes.

The respondent submits, therefore, that even if it *had* been divested of its property by the sale under the mechanics' liens, yet its interest in the *res* which might ripen into title upon the failure of the holder of the certificate of sale to obtain a deed, was sufficient property for the purposes of Section 77B. However, the corporation was not divested of the property and it still has it. The master's certificate of sale was acquired by the debtor (R. 72). No deed will ever issue.

CONCLUSION.

The authority of federal legislation and federal courts over insolvent or bankrupt corporations, dissolved or otherwise, is paramount. No action of a state legislature or of a state court can impair, curtail, or impede the federal power. Moreover, the federal courts have found that it is the public policy of Illinois that a dissolved corporation still has a qualified existence to garner its property and to distribute its assets, and that the rights of claimants and of the corporation in such cases are reciprocal.

A uniform host of decisions of federal courts supports the decision of the Circuit Court of Appeals, the District Court, and the Master in the instant case.

The amendments to the Bankruptcy Act are remedial, affording relief to corporations and their stockholders as well as to creditors.

The respondent corporation has never been divested of its property.

The petitioner herein, a trustee under a mortgage, has no standing to contest the jurisdiction of the Court.

It is respectfully submitted that the decree and decision of the Circuit Court of Appeals be affirmed.

GEORGE I. HAIGHT,
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Attorneys for Respondent.

APPENDIX.

Smith-Hurd, Illinois Revised Statutes, 1929, Chapter 32:

Expiration by limitation—Closing business.

"SEC. 14. All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity."

Dissolution—When creditors affected.

"SEC. 79. The dissolution, for any cause whatever, of any corporation, shall not take away or impair any remedy given against such corporations, its officers, or stockholders, for any liabilities incurred previous to its dissolution, if suit therefor is brought and service of process had within two years after such dissolution."

Smith-Hurd, Illinois Revised Statutes, 1929, Chapter 77:

Redemption by defendant, etc.

"SEC. 18. Any defendant, his heirs, administrators, assigns, or any person interested in the premises, through or under the defendant, may, within twelve months from said sale, redeem the real estate so sold by paying to the purchaser thereof, his executors, administrators or assigns or to the sheriff or master in chancery, or other officer who sold the same, or his successor in office, for the benefit of such purchaser, his executors, administrators, or assigns, the sum of money for which the premises were sold or bid off, with interest thereon at the rate of six per centum per annum from the time of such sale, whereupon such sale and certificate shall be null and void."

Redemption by creditor, etc.

"SEC. 20. If such redemption is not made, any decree or judgment creditor, his executors, administrators or assigns may, after the expiration of twelve months and within fifteen months after the sale, redeem the premises in the following manner: Such creditor,

his executors, administrators or assigns may sue out an execution upon his judgment or decree, and place the same in the hands of the sheriff or other proper officer to execute the same, who shall indorse upon the back thereof a levy of the premises desired to be redeemed; and the person desiring to make such redemption shall pay to such officer the amount for which the premises to be redeemed were sold, with interest thereon at the rate of six per centum per annum from the date of the sale, for the use of the purchaser of such premises, his executors, administrators or assigns, whereupon such officer shall make and file in the office of the recorder of the county in which the premises are situated a certificate of such redemption, and shall advertise and offer the premises for sale under said execution as in other cases of sale or execution."

Illinois Revised Statutes, 1937:

Decree of involuntary dissolution.

"SEC. 91. In proceedings to liquidate the assets and business of a corporation, when the costs and expenses of such proceeding and all debts, obligations, and liabilities of the corporation shall have been paid and discharged and all of its remaining property and assets distributed to its shareholders, or in case its property and assets are not sufficient to satisfy and discharge such costs, expenses, debts, and obligations, all the property and assets have been applied so far as they will go to their payment, the court shall enter a decree dissolving the corporation, whereupon the existence of the corporation shall cease."

Survival of remedy after dissolution.

"SEC. 94. The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by the decree of a court of equity when the court has not liquidated the assets and business of the corporation, or (3) by an expiration of its period of duration, shall not take away or impair any remedy given against such corporation, its directors, or shareholders, for any liability incurred prior to such dissolution if suit thereon is brought and service of process had within two years after the date of such dissolution. Such suits may be prosecuted against and defended by the corporation in its corporate name."

SUPREME COURT OF THE UNITED STATES.

Nos. 23, 24.—October Term, 1937,

Chicago Title and Trust Company, as Successor Trustee under the Trust Deed Recorded as Document No. 10325493, Petitioner,
23 *vs.*
Forty-One Thirty-Six Wilcox Building Corporation.

Chicago Title and Trust Company, as Successor Trustee under the Trust Deed Recorded as Document No. 10325493, Petitioner,
24 *vs.*
Forty-One Thirty-Six Wilcox Building Corporation.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 15, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

Respondent was organized as a corporation under the laws of Illinois; and pursuant to those laws it was dissolved. The only property it ever owned or possessed was a building and the land upon which it stood, situated at No. 4136 Wilcox Avenue in the City of Chicago. This property, when acquired, was subject to the lien of a first mortgage, securing bonds aggregating $95,000, and, subsequent to the acquisition of the property, to a junior mortgage to secure the payment of $15,000. The corporation was organized on April 10, 1929. On May 22, 1931, the Superior Court of Cook County, Illinois, in a proceeding regularly before it, and in accordance with a statute of Illinois, entered a decree dissolving the corporation and declaring its charter and authority as such to be null and void. The decree has never been appealed from or otherwise challenged or assailed. That it became and is now effective cannot be doubted.

On July 10th, certain mechanics' liens were foreclosed, and a sale of the property thereafter made pursuant to the foreclosure decree. Certificate of sale was issued, entitling the holder thereof to a conveyance of the property upon the expiration of the period of redemption. The right of redemption expired as to respondent on August 5, 1932, and as to creditors on November 5, 1932. No redemption has ever been made or attempted. On October 24, 1931, suit was brought in a state court to foreclose the lien of the first mortgage; and on November 10, 1931, suit was brought in the same court to foreclose the lien of the junior mortgage. A receiver was appointed, who took possession of the property, and was in possession thereof at the time this case was heard in the federal district court. Respondent appeared in both foreclosure suits, but apparently offered no defense.

By the statutes of Illinois (Smith-Hurd Rev. Stat., 1929, c. 32) it is provided:

"§ 14. All corporations organized under the laws of this State, whose powers may have expired by limitation or otherwise, shall continue their corporate capacity for two years for the purpose only of collecting debts due such corporation and selling and conveying the property and effects thereof. Such corporations shall use their respective names for such purposes and shall be capable of prosecuting and defending all suits at law or in equity.

. . . . . .

"§ 79. The dissolution, for any cause whatever, of any corporation, shall not take away or impair any remedy given against such corporation, its officers, or stockholders, for any liabilities incurred previous to its dissolution, if suit therefor is brought and service of process had within two years after such dissolution."

The two-year period, within which the corporation could sue, acquire property, or perform any corporate function apart from suits then pending, expired May 22, 1933.

Thus matters remained until May, 1935, when three persons, namely, Mrs. Fay Fischel, her father Hyman Schulman, and her brother Sam Schulman, acquired all the shares of the respondent from the then stockholders. Meetings purporting to be stockholders' and directors' meetings were then held, officers and directors elected, and a resolution was passed authorizing the filing of a petition for the reorganization of respondent under § 77 B of the Bankruptcy Act, 48 Stat. 912; 11 U. S. C. § 207.

On June 13, 1935, respondent filed a petition for reorganization under § 77B; and on June 21st, filed a petition praying for an order directing the receiver in the state foreclosure suits to turn over property in his possession and restraining the further prosecution of such suits. Petitioner answered, denying that respondent was a corporation, setting up the corporate dissolution, the foreclosure proceedings and the sale of the corporate property. It also averred that the bankruptcy petition was not filed in good faith.

The special master, to whom the case was referred, found and reported that the bankruptcy petition had been filed in good faith; that respondent had legal capacity to file the petition, and that the petition was sufficient to confer jurisdiction upon the court over respondent and the property in question. The master further found that no deed ever issued under the mechanic's lien foreclosure certificate; and that such certificate was purchased and now is the property of the debtor. However, it appears from the record that the certificate was purchased in connection with the acquisition of the stock by the three persons already mentioned, more than two years after the period of redemption had expired.

The federal district court confirmed the report of the master, appointed a temporary trustee, required the state-court receiver to turn over the property to the trustee, and restrained further prosecution of the foreclosure proceedings. On appeal, the court below affirmed the order of the district court, Judge Briggle dissenting. 86 F. (2d) 667.

In the decisions of other circuit courts of appeal, cited by respondent, support may be found for involuntary proceedings in bankruptcy against a dissolved corporation, brought by creditors and based upon an act of bankruptcy committed within four months. The question presented here differs substantially from the questions presented in those cases; and we put them aside as inapplicable, without either approval or disapproval. The sole question now for determination is whether under the facts just detailed, a corporation, dissolved and put out of existence by the state which created it, may, nevertheless, itself invoke the powers of a court of bankruptcy under § 77B. The record does not present a case where creditors are the moving parties, or where there has been any act of bankruptcy committed by the corporation, or where any pertinent law of the state is in conflict with the federal bankruptcy laws.

The decisions of this court are all to the effect that a private corporation in this country can exist only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person. There must be some statutory authority for the prolongation of its life, even for litigation purposes. *Oklahoma Gas Co.* v. *Oklahoma,* 273 U. S. 257; *National Bank* v. *Colby,* 21 Wall. 609, 615; *Oregon Railway Co.* v. *Oregonian Ry. Co.,* 130 U. S. 1, 20. See, also, *Greeley* v. *Smith,* 3 Story 657, 10 Fed. Cas. p. 1075; *Board of Councilmen* v. *Deposit Bank,* 120 Fed. 165, 166 *et seq.*; *Dundee Mtg. & Tr. Inv. Co.* v. *Hughes,* 77 Fed. 855.

Sections 14 and 79 of the Illinois statute seem plain enough on their face; but if any doubt as to their meaning and effect would otherwise exist, that doubt has been set at rest by the decisions of the Illinois appellate courts. In *Life Ass'n of America* v. *Fassett,* 102 Ill. 315, decided before the sections under consideration were enacted, the state supreme court held that it was the settled policy of the state that upon the dissolution of domestic corporations, however effected, they were to be regarded as still existing for the purpose of settling up their affairs and having their property applied for the payment of their just debts. See *Singer & Talcott Co.* v. *Hutchinson,* 176 Ill. 48, 51. In *American Exchg. Bank* v. *Mitchell,* 179 Ill. App. 612, 615-616, the general rule was announced that after a corporation is dissolved, it is incapable of maintaining an action; and that all such actions pending at the time of dissolution abate, in the absence of a statute to the contrary. The state decisions following the enactment of these sections make it clear that this general rule still remains in force in Illinois except for the specific modifications in respect of time and circumstance set forth in §§ 14 and 79. See *Dukes* v. *Harrison & Reidy,* 270 Ill. App. 372; *Consolidated Coal Co.* v. *Flynn Coal Co.,* 274 Ill. App. 405. See, also, *A. J. Bates Co.* v. *United States,* 3 F. Supp. 245, 248; *Charles A. Zahn Co.* v. *United States,* 6 F. Supp. 317, where the Court of Claims held that under these sections of the Illinois statute an Illinois corporation ceased to exist and became incapable of transacting any business whatever in its corporate capacity; and that a suit purporting to be brought by a dissolved corporation after two years to recover internal-revenue taxes paid by the corporation could not be maintained.

It is plain enough, under the Illinois statute, that after the expiration of two years from the date of its dissolution, respondent was without corporate capacity to initiate any legal proceeding—including a proceeding under § 77B, unless we are able to say that the statute, in its terms or in its application, is in conflict with § 77B. While state laws in conflict with the laws of Congress on the subject of bankruptcies are suspended, they are suspended "only to the extent of actual conflict with the system provided by the Bankruptcy Act of Congress." *Stellwagen* v. *Clum*, 245 U. S. 605, 613. The dissolution effected under Illinois law is in no way related to a state of insolvency or bankruptcy. Insolvency or bankruptcy as a ground for dissolution is not within the terms or contemplation of the law. Liquidation of a corporation is no part of the purpose of the dissolution; nor is insolvency or liquidation involved in the proceedings to enforce the mechanics' liens or foreclose the mortgages. Quite evidently, the latter were simply ordinary proceedings to enforce liens against the property subject thereto. *Straton* v. *New*, 283 U. S. 318, 327-330. The state receivership was purely incidental to the foreclosure suits, and therefore limited and special. It was not an equity receivership within the meaning of § 77B of the Bankruptcy Act. *Duparquet Co.* v. *Evans*, 297 U. S. 216, 219-221.

The principle recently announced in *Hopkins Savings Assn.* v. *Cleary*, 296 U. S. 315, 337, is applicable here. That case dealt with an intrusion by the federal government on the powers of the state over state building-and-loan associations. Speaking of these associations, this court said: "How they shall be formed, how maintained and supervised, and how and when dissolved, are matters of governmental policy, which it would be an intrusion for another government to regulate by statute or decision, except when reasonably necessary for the fair and effective exercise of some other and cognate power explicity conferred." It is not reasonably possible to find any conflict between § 77B and the Illinois statute or the dissolution proceedings or the lien-foreclosure suits.

The court below relied upon its former decision in the case of *In re 211 East Delaware Place Bldg. Corp.*, 76 F. (2d) 834. That was a case, however, where the bankruptcy petition had been filed by creditors, not by the dissolved corporation; and, therefore, the capacity of the defunct corporation to institute proceedings was not involved. We express no opinion as to the correctness of this

decision; but Judge Evans, who wrote the opinion, apparently regarded the distinction as important. For in a later proceeding in the case, 14 F. Supp. 96, 100, he said that the forfeiture of the charter of the corporation did not prevent such a proceeding by *creditors,* and then added, "The only effect which this loss of corporate existence may have upon a bankruptcy proceeding is in respect to the inability of the *corporation* to admit acts of bankruptcy or state of insolvency *or to file a voluntary petition.*" (Italics supplied.)

How long and upon what terms a state-created corporation may continue to exist is a matter exclusively of state power. *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305, 312-313; *Ashley* v. *Ryan,* 153 U. S. 436, 441, 443; *New Jersey* v. *Anderson,* 203 U. S. 483, 493. The circumstances under which the power shall be exercised and the extent to which it shall be carried are matters of state policy, to be decided by the state legislature. There is nothing in the federal Constitution which operates to restrain a state from terminating absolutely and unconditionally the existence of a state-created corporation, if that be authorized by the statute under which the corporation has been organized. And it hardly will be claimed that the federal government may breathe life into a corporate entity thus put to death by the state in the lawful exercise of its sovereign authority.

The power to take the long step of putting an end to the corporate existence of a state-created corporation without limitation, connotes the power to take the shorter one of putting an end to it with such limitations as the legislature sees fit to annex. Compare *Packard* v. *Banton,* 264 U. S. 140, 145; *Davis* v. *Massachusetts,* 167 U. S. 43, 47; *Rippey* v. *Texas,* 193 U. S. 504, 509-510. And since the federal government is powerless to resurrect a corporation which the state has put out of existence for all purposes, the conclusion seems inevitable that if the state attach qualifications to its sentence of extinction, nothing can be added to or taken from these qualifications by federal authority.

It is suggested that the state cannot keep the corporation alive for its own purposes and deny it life for federal purposes. The proposition need not be challenged, since it is perfectly evident that here the state has reserved nothing for itself which it has denied to the federal authority. The only relevant provisions are those relating to legal proceedings. The state law permits such

proceedings to be instituted on behalf of a dissolved corporation within two years; but these proceedings may be brought either in the state courts, or, when appropriate, in the federal courts. After two years, no proceedings may be *initiated* on behalf of the corporation in either state or federal courts, but such proceedings as have been instituted during that period in any of these courts may be prosecuted to completion. *Singer & Talcott Co.* v. *Hutchinson, supra,* pp. 52-53. The right of resort to the courts of the state, and to those of the nation having jurisdiction, both in respect of the initiation of proceedings and the completion of proceedings already initiated, so far as Illinois law is concerned, stands upon an exact parity.

The aim of this proceeding under § 77B is to bring about a reorganization of a corporation which has been dissolved and shorn of its capacity to initiate any legal proceeding by the state which possesses, in respect of the corporation, the power of life and death. It is not a proceeding on behalf of creditors. It is not a liquidation proceeding having for its object the distribution of the corporate assets. The dissolution was adjudged because the corporation had disobeyed the laws of the state. For that reason the state prohibited the continuance of the corporate enterprise. The stockholders, however, now seek to escape the penalty for this dereliction by resuscitating and continuing the corporation, and, to that end, invoke the aid of a federal statute. This is simply an attempt to thwart a valid state law. Whether the enterprise be continued under the original name and charter of the corporation, or in some new corporate name or guise, can make no difference. Either course would contravene the legislatively-declared policy of the state. Section 77B cannot be regarded as countenancing such a result.

The only power left to the corporation when this proceeding was brought was to finish pending cases begun within two years after its dissolution. With that exception, its corporate powers were ended for all time and for all purposes. It was without authority to purchase the certificate issued at the mechanic's-lien foreclosure sale, or to adopt resolutions authorizing proceedings under § 77B, or to bring a proceeding to effectuate a reorganization under that section. In respect of these matters the corporation was nonexistent.

Decree reversed.

SUPREME COURT OF THE UNITED STATES.

Nos. 23 and 24.—October Term, 1937.

Chicago Title and Trust Company, as successor trustee under the trust deed recorded as document 10325493, Petitioner, *vs.* Forty-One Thirty-Six Wilcox Building Corporation, Respondent.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 15, 1937.]

Mr. Justice Cardozo, dissenting.

I am unable to concur in the opinion of the Court.

1. Respondent, though dissolved, was still a corporation in such a sense and to such a degree as to have capacity to maintain a proceeding in bankruptcy for the liquidation of its assets.

By Bankruptcy Act § 4 (11 U. S. C. § 22 (a)), any corporation, with exceptions not now material, may become a voluntary bankrupt.

By Bankruptcy Act § 1 (6) (11 U. S. C. § 1 (6)), " 'corporations' shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships. . . ."

Respondent, when it filed its petition in the bankruptcy court, was still in possession of some of the privileges and powers of private corporations not possessed by individuals or partnerships. True, a decree of dissolution had been entered by a court of Illinois, the place of its domicile. True, two years had gone by since the making of that decree. None the less, the corporation still had the power, if suits were then pending either in its favor or against it, to litigate in its corporate name and through its corporate officials. *Life Association of America* v. *Fassett*, 102 Ill. 315; *Singer & Talcott Stone Co.* v. *Hutchinson*, 176 Ill. 48; *Commercial Trust Co.* v. *Mallers*, 242 Ill. 50; *Graham & Morton Transp. Co.* v. *Owens*, 165 Ill. App. 100; *Griggsville State Bank* v. *Newman*, 275 Ill. App. 11. With the license of Illinois, respondent was actively defending suits for the foreclosure of mortgages on its property when it went into

the federal court. A fragment of corporate power was thus untouched by dissolution. Within the definition of the Bankruptcy Act, the body that retained this power, and indeed exercised it too, was still a corporation. There are suggestions in the books that even in the absence of a statute preserving corporate capacities after a decree of dissolution, the bankruptcy power to distribute the assets of an insolvent debtor is not subject to destruction by a withdrawal, possibly a precipitate one, of corporate existence. See, e. g., *Hammond* v. *Lyon Realty Co.*, 59 F. (2d) 592, 594, 595. Cf. *Austin* v. *Thomas*, 78 F. (2d) 602; *In re American & British Mfg. Corp.*, 300 Fed. 839, 847; *Cresson & Clearfield Coal Co.* v. *Stauffer*, 148 Fed. 981. The case at hand does not charge us with a duty to decide whether that is so. Here the state has elected to keep the corporation in existence, maimed but still alive. In choosing to create or continue an artificial entity, though with limited and narrow powers, the state subjects its creature to the bankruptcy power of the Congress in so far as that power is directed at juristic beings of that order. Congress has said to Illinois: "If an association with any corporate capacities exists under your laws, bankruptcy—either voluntary or involuntary—is a proper form of liquidation." To this the state responds, or is figured as responding: "An association with corporate capacities does exist under our laws, but it may not go into a court of bankruptcy because we will not give it the capacity to go there. Winding up proceedings for one in its position are in the state tribunals only." The response, even if taken to be authentic, must be held of no avail. It is not within the competence of Illinois by any form of words to preserve the artificial entity for a purpose of her own and destroy it for the purpose of withdrawal from the supremacy of federal law.

2. If respondent has capacity to maintain a bankruptcy proceeding to liquidate its business through the medium of a sale for cash, it has capacity also to maintain a bankruptcy proceeding under section 77B.

A proceeding under section 77B is styled one to give effect to a corporate reorganization. Whatever its form or label, it derives its origin and vitality from the bankruptcy power. *Continental Illinois National Bank and Trust Co.* v. *Chicago, Rock Island and Pacific Ry. Co.*, 294 U. S. 648; *Campbell* v. *Alleghany Corporation*,

75 F. (2d) 947; *In re New Rochelle Coal & Lumber Co.*, 77 F. (2d) 881. Only because the remedy is traceable to that power is it constitutional and valid. The notion is baseless that reorganization, even when initiated on the petition of the debtor, is solely or chiefly for the benefit of shareholders. It is even more distinctively and commonly for the benefit of creditors. Cf. *In re Central Funding Corporation*, 75 F. (2d) 256, 261. The old form of bankruptcy had in view a liquidation of the assets for cash and nothing else, a method of disposing of them that might result in needless sacrifice. The new form of bankruptcy is more flexible and often more efficient, permitting as it does, a disposition of the assets upon credit as well as for cash, and in consideration of shares of stock or bonds to be issued by the buyer. Whoever, being a corporation, may resort to the old form, is at liberty, acting in good faith, to resort to the new. This is so by the express mandate of the statute, which tells us (§ 77B; 11 U. S. C. § 207 (a)) that "any corporation which could become a bankrupt under section 4 (11 U. S. C. § 22) of this Act" may petition in the new proceeding. By that test a dissolved corporation with capacity requisite to apply to a court of bankruptcy for a liquidation of its assets has the capacity requisite to apply for a reorganization of its business. As to this, the lower federal courts are in general accord. *Old Fort Improvement Co.* v. *Lea*, 89 F. (2d) 286; *In re 4136 Wilcox Bldg. Corp.*, 86 F. (2d) 667; *Capital Endowment Co.* v. *Kroeger*, 86 F. (2d) 976; *In re 211 East Delaware Place Bldg. Corp.*, 76 F. (2d) 834, 836. Their opinions vindicating that conclusion are instructive and convincing.

This is not to say that every method of reorganization appropriate or permissible for a corporation whose life is unimpaired is appropriate or permissible for one already doomed. The plan of reorganization will be unlawful if it attempts to authorize the debtor, following a decree of dissolution, to do business thereafter in defiance of state law. In general there will be little difficulty in so adapting a decree to the necessities of the particular case as to attain the needed harmony. The opinions already cited suggest appropriate expedients. *Old Fort Improvement Co.* v. *Lea, supra*, p. 290; *Capital Endowment Co.* v. *Kroeger, supra*, p. 979. Instead of continuing the business through the petitioning debtor or its agents, the decree may permit the formation of another corporation which will take over the assets, issuing shares of stock or

bonds to creditors or others. There may be new capital, new shareholders, new directors and officers. Neither in the record nor in the precedents does one find a basis for a holding that the formation of such a corporation will be in conflict with any public policy of the state of Illinois. The old corporation was dissolved for failure to pay franchise taxes and file an annual report. The new one, if created, may promote the welfare of the state both financially and otherwise. Be that as it may, the state will be amply competent to vindicate her own dignity if there is a fraud upon her laws. No plan of reorganization is before us at this time. So far as appears, none has been prepared. Whether the plan to be submitted later will be worthy of confirmation is a question for the future.

Cases may indeed arise where a court will be satisfied upon the filing of the petition that reorganization is not feasible. In that event the proceeding may be dismissed as not brought in good faith. *Tennessee Pub. Co.* v. *American Bank*, 299 U. S. 18, 22. At times a decree of dissolution may be a circumstance along with others pointing to that conclusion. Here the good faith of the debtor has been found by the courts below after inquiry by a Master to whom the cause had been referred. The single question presented to us by the petition for certiorari is one of jurisdiction. Did a court of bankruptcy have power to entertain the proceeding at the instance of such a suitor? I hold that power did not fail.

Mr. Justice STONE and Mr. Justice BLACK join in this opinion.